

IN THE SECOND JUDICIAL DISTRICT COURT OF
THE STATE OF NEVADA IN AND FOR THE
COUNTY OF WASHOE

JUSTIN CARL LUCKETT on behalf of
himself and all others similarly situated and
typical,

Plaintiff,

Case No. CV16-02315

Dept. No. 3

vs.

WASHOE COUNTY SHERIFF'S OFFICE,
and CHUCK ALLEN in his official capacity
only as the Sheriff of Washoe County (sic),
and all its agents and assigns,

Defendants.

ORDER

Currently before the Court is the WASHOE COUNTY SHERIFF OFFICE and SHERIFF
CHUCK ALLEN'S (collectively "Defendants") MOTION TO DISMISS ("Motion") filed on
December 16, 2016. JUSTIN CARL LUCKETT ("Plaintiff") filed an Opposition on December 28,
2016. Defendants filed the Reply on January 4, 2017.

I. Motion to Dismiss Standard

Under Nevada Rule of Civil Procedure 12(b)(5), a complaint will not be dismissed for
failure to state a claim unless "it appears beyond a reasonable doubt that the plaintiff could prove no

1 set of facts which, if accepted by the trier of fact, would entitle him or her to relief.” *Simpson v.*
2 *Mars Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997); *Vacation Village v. Hitachi America*, 110
3 Nev. 481, 484, 874 P.2d 744, 746 (1994). There is a strong presumption against dismissing an
4 action for failure to state a claim. *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 249 (9th Cir.
5 1997). When determining whether to grant a moving party’s motion to dismiss, all factual
6 allegations of the complaint must be accepted as true. *Vacation Village, Inc.*, 110 Nev. at 484, 874
7 P.2d at 746. The court must construe the pleading liberally and draw every fair inference in favor of
8 the nonmoving party. *Id.* at 484, 874 P.2d at 746. A motion to dismiss should not be granted unless
9 it appears beyond a doubt that a party could prove no set of facts that would entitle them to relief.
10 *Pankopf v. Peterson*, 124 Nev. 43, 45, 175 P.3d 910, 912 (2008) (citing *Vacation Village*, 110 Nev.
11 at 484). Specifically, “the test for determining whether the allegations of a complaint are sufficient
12 to assert a claim for relief is whether the allegations give fair notice of the nature and basis of a
13 legally sufficient claim and the relief requested. *Id.*

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16 Plaintiff asserts claims for (1) spending an excessive amount of time in jail in violation of
17 the Nevada Constitution and NRS 171.185(5), (2) denial of Equal Protection under the Fourteenth
18 Amendment of the United States Constitution and Article I, Section 1 of the Nevada Constitution,
19 (3) taking of property in violation of the Nevada Constitution, (4) excessive time in jail under Title
20 42, United States Code, Section 1983, and (5) taking of property in violation of the Title 42, United
21 States Code, Section 1983. All claims are discussed below.
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23 **II. Discretionary Immunity Pursuant to NRS 41.032**

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25 NRS 41.032(2) provides complete immunity from claims based on a state employee’s
26 exercise or performance of a discretionary function or duty:

27 [N]o action may be brought under NRS 41.031 ... which is:

28 2. Based upon the exercise or performance or the failure to exercise or perform a discretionary
function or duty on the part of the State or any of its agencies or political subdivisions or of

1 any officer, employee or immune contractor of any of these, whether or not the discretion
2 involved is abused.

3 The Nevada Supreme Court, in adopting the federal approach, has stated that to qualify
4 within the scope of discretionary-act immunity, “a decision must (1) involve an element of
5 individual judgment or choice and (2) be based on considerations of social, economic, or political
6 policy. In this, we clarify that decisions at all levels of government, including frequent or routine
7 decisions, may be protected by discretionary-act immunity, if the decisions require analysis of
8 government policy concerns. However, discretionary decisions that fail to meet the second criterion
9 of this test remain unprotected by NRS 41.032(2)'s discretionary-act immunity.” *Martinez v.*
10 *Maruszczak*, 123 Nev. 433, 446–47, 168 P.3d 720, 729 (2007). The focus of the second inquiry is
11 not on the employee's subjective intent in exercising the discretion conferred, but on the nature of
12 the actions taken and whether they are susceptible to policy analysis. *Butler ex rel. Biller v. Bayer*,
13 123 Nev. 450, 466, 168 P.3d 1055, 1066 (2007).
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15 The general purpose of Nevada's waiver of sovereign immunity is “to compensate victims of
16 government negligence in circumstances like those in which victims of private negligence would be
17 compensated.” *Id.* at 564, 168 P.3d at 1066 (citing *Harrigan v. City of Reno*, 86 Nev. 678, 679, 475
18 P.2d 94, 94 (1970)). Courts must assess cases on their facts, keeping in mind the purpose of the
19 exception, which is ‘to prevent judicial “second guessing” of legislative and administrative
20 decisions grounded in social, economic, and political policy through the medium of an action in
21 tort.’ *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797,
22 814, 104 S. Ct. 2755, 2765 (1984). Further, intentional torts and bad faith conduct are exempt from
23 statutory discretionary-function immunity because those acts cannot be within the actor's discretion.
24 *Franchise Tax Bd. of Cal. v. Hyatt*, 130 Nev. Adv. Op. 71, 335 P.3d 125, 135 (2014).
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1 In the Motion, Defendants assert that both Sheriff Chuck Allen and the Washoe County
2 Sheriff's Office are entitled to discretionary act immunity in their operation of the Washoe County
3 Regional Detention Facility, thus Plaintiff's claims brought for excessive confinement are barred.
4 Defendants argue it is the sole role of the Washoe County Regional Detention Facility to monitor
5 relative blood alcohol levels of arrested inmates and to determine when arrestees are safe to release
6 from the facility.
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8 NRS 178.484(6) provides:

9 "A person arrested for a violation of NRS 484C.110, 484C.120, 484C.130, 484C.430,
10 488.410, 488.420 or 488.425 who is under the influence of a controlled substance, is under the
11 combined influence of intoxicating liquor and a controlled substance, or inhales, ingests,
12 applies or otherwise uses any chemical, poison or organic solvent, or any compound or
13 combination of any of these, to a degree which renders the person incapable of safely driving
14 or exercising actual physical control of a vehicle or vessel under power or sail must not be
15 admitted to bail or released on the person's own recognizance sooner than 12 hours after
16 arrest."

17 NRS 178.484(5) further provides:

18 "A person arrested for a violation of NRS 484C.110, 484C.120, 484C.130, 484C.430,
19 488.410, 488.420 or 488.425 who is under the influence of intoxicating liquor must not be
20 admitted to bail or released on the person's own recognizance unless the person has a
21 concentration of alcohol of less than 0.04 in his or her breath. A test of the person's breath
22 pursuant to this subsection to determine the concentration of alcohol in his or her breath as a
23 condition of admission to bail or release is not admissible as evidence against the person."

24 Pursuant to statute, Defendants were not permitted to release Plaintiff from custody sooner than
25 twelve hours after his arrest on October 29, 2016 and Plaintiff was also required to have a BAC
26 under 0.04 prior to release. However, deciding when to administer a BAC test and release an
27 arrestee from custody requires an exercise of discretion and personal judgment. Therefore, the first
28 prong of the discretionary-act immunity test is met. Further, this exercise of judgment is susceptible
to a policy analysis. The imposition of liability in this case would undoubtedly hinder the quality of
the Defendants' policy-making and procedures, therefore liability attaches under the second prong

1 of the test. *See Martinez*, 123 Nev. at 447, 168 P.3d at 729. Based on the foregoing, this Court finds
2 that Defendants are entitled to discretionary immunity pursuant to NRS 41.032 and Plaintiff's
3 claims for excessive confinement are dismissed.

4 5 **III. Equal Protection**

6 Plaintiff's Second Cause of Action is for Denial of Equal Protection of the Law in Violation of
7 Article I, Section I of the Constitution of the State of Nevada. Equal protection of the law has long
8 been recognized to mean that no class of persons shall be denied the same protection of the law which
9 is enjoyed by other classes in like circumstances. *Truax v. Corrigan*, 257 U.S. 312, 336, 42 S. Ct.
10 124, 130 (1921). Article I, Section I of the Nevada Constitution provides:

12 "All men are by Nature free and equal and have certain inalienable rights among which are
13 those of enjoying and defending life and liberty; Acquiring, Possessing and Protecting
14 property and pursuing and obtaining safety and happiness[.]"

15 An equal protection analysis first requires that the appropriate standard of judicial scrutiny be
16 identified, and then that the statutory classification be considered under that appropriate level of
17 scrutiny. *Gaines v. State*, 116 Nev. 359, 371, 998 P.2d 166, 173 (2000). Strict scrutiny is applied in
18 cases involving fundamental rights, such as privacy, marriage, or cases involving a suspect class. *Id.*
19 Under the strict scrutiny approach, a state action is sustained only if it is narrowly tailored and
20 necessary to advance a compelling state interest. *Id.*

21 In the Motion, Defendants argue that Plaintiff fails to allege in the Complaint that he is
22 asserting this claim under Section 1983. Further, the process of releasing people from custody is
23 administered by the Court system and not the Defendants. It is argued that the Complaint failed to
24 identify a policy related to the excessive jail time claim, which is required to hold a municipality
25 liable under Section 1983. Additionally, Sheriff Chuck Allen is an inappropriate party under Section
26 1983 because Plaintiff must allege injury traceable to a county policy.
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1 In the Opposition, Plaintiff argues he was denied timely release based on his race and states
2 that minority arrestees are considered by the Defendants to be second class citizens not worthy of
3 respect and due process of law, and that white non-minority detainees do not face this kind of delay.
4 Specifically, this denial of equal protection was shown when a deputy sheriff asked Plaintiff if the
5 Washoe County Jail is better than the one in Oakland, when Plaintiff had never been incarcerated
6 before that point.
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8 Here, Plaintiff asserts that minorities are detained longer than non-minority whites. Race has
9 clearly been defined as a "suspect class" for equal protection purposes. *See Bolling v. Sharpe*, 347
10 U.S. 497, 499, 74 S. Ct. 693, 694 (1954) (citing *Korematsu v. United States*, 323 U.S. 214, 216, 65
11 S. Ct. 193, 194 (1944)). The Complaint also alleges that the Washoe County Sheriff's Office treats
12 similarly situated persons dissimilarly. *See Gaines v. State*, 116 Nev. 359, 371, 998 P.2d 166, 173
13 (2000). It is clear the Complaint pleads the required elements for an equal protection claim.
14 However, it has been held that although a complaint does not need to contain detailed factual
15 allegations, it must offer more than "a formulaic recitation of the elements of a cause of action" and
16 "raise a right to relief above a speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555,
17 127 S. Ct. 1955, 1965 (2007). Plaintiff vaguely alleges he was required to spend more time in jail
18 than other inmates waiting to be admitted to bail due to the racial prejudice of the jail's employees
19 and merely speculates as to racial prejudice based on the comment of one sheriff's deputy. Factual
20 allegations must be enough to raise a right to relief above the speculative level, however, Plaintiff's
21 allegations are mere speculation, labels and conclusions. Therefore, Plaintiff's Second Cause of
22 Action is dismissed based on the foregoing.
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IV. Taking of Property

Plaintiff's Third Cause of Action is for Taking of Property in Violation of the Constitution of the State of Nevada and Fifth Cause of Action is for Taking of Property Pursuant to 42 U.S.C. § 1983 for Violation of the Fifth Amendment of the United States Constitution. Both are discussed below.

a. Takings Clause of Nevada Constitution

The Takings Clause of the Nevada Constitution provides that "[p]rivate property shall not be taken for public use without just compensation having been first made, or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made." Nev. Const. art. 1, § 8, cl. 6. "Private property" is plain on its face and held to be broad and apply to all types of privately owned property, including personal property. *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 646-47, 173 P.3d 734, 739 (2007). For a taking to occur, a claimant must have a stick in the bundle of property rights. *McCarran Int'l Airport v. Sisolak*, 122 Nev. 645, 658, 137 P.3d 1110, 1119 (2006). The bundle of property rights includes all rights inherent in ownership, including the inalienable right to possess, use, and enjoy the property. *Id.* A taking can arise when the government regulates or physically appropriates an individual's private property. Physical appropriation exists when the government seizes or occupies private property or ousts owners from their private property. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537, 125 S. Ct. 2074 (2005).

In the Motion, Defendants argues that lawful incarceration brings about the withdrawal of many privileges and rights. Upon release from custody, Plaintiff had the *choice* of receiving ten dollars in currency and a check for \$1,423.00 from the facility, or a debit card containing \$1,423.00. The detention facility was permitted to regulate the form of money returned to Plaintiff upon his release due to the risks of mishandling, corruption, and safety of the currency. The Opposition asserts that many arrestees are poor and do not have a bank account, making checks worthless

1 pieces of paper. Therefore, it is wrong to assume that a check is the equivalent to cash. Also, the
2 debit card choice is the only option to pay for a cab ride home, even though a debit card is laden
3 with fees.

4 The Complaint alleges that Plaintiff was “required to surrender \$1,430.00 upon detention
5 but upon release was deprived of the full value of his property due to Defendant’s Money Inventory
6 Booking Policy.” *Compl. 13:8-12*. The cash taken from Plaintiff at the time of booking is personal
7 property and clearly protected by the takings clause. *See ASAP Storage, Inc.*, 123 Nev. at 646-47,
8 173 P.3d at 739. The Washoe County Sheriff’s Office took physical control over Plaintiff’s personal
9 property, thus there was a “taking.” In exchange for cash, Plaintiff received a debit card laden with
10 fees and received a value less than what was taken from him at booking. Therefore, this Court will
11 not dismiss Plaintiff’s Third Cause of Action.
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14 b. Takings Clause of United States Constitution

15 The Takings Clause of the United States Constitution provides, “[N]or shall private property
16 be taken for public use, without just compensation.” U.S. Const., Am. 5. This Court must first
17 determine whether it has jurisdiction over Plaintiff’s Fifth Cause of Action brought under 42 U.S.C.
18 § 1983 Claims.
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20 i. *Jurisdiction over 42 U.S.C. § 1983 Claims*

21 In the Motion, Defendants argue Plaintiff cannot sue Sheriff Chuck Allen in his official
22 capacity because officials acting in their official capacities are not persons under 42 U.S.C. § 1983.
23 Additionally, Defendants assert the State of Nevada has not waived immunity on behalf of the
24 departments of political subdivisions, and that the Washoe County Sheriff’s Office has not been
25 conferred the power to sue and be sued pursuant to NRS 41.031. The authorization to bring suit
26 under NRS 41.031(2) does not extend to departments of municipal government.
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1 The Opposition argues this Court has jurisdiction over Defendants for the reasons stated in
2 *Messad v. Reno Justice Court*. In the *Messad* case, the Court held that the Plaintiff was permitted to
3 bring an action under 42 U.S.C. § 1983 for excessive delay in processing bail against the same
4 Defendants in this case. Additionally, the issues in this case were already litigated in *Messad*, thus
5 issue preclusion applies and Defendants cannot raise the same arguments in this case.
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7 The Civil Rights Act of 1964, 42 U.S.C. § 1983 states in relevant part, “Every person who,
8 under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the
9 District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other
10 person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities
11 secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in
12 equity, or other proper proceeding for redress ...” The Supreme Court has held that § 1983 “is not
13 itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred
14 by those parts of the United States Constitution and federal statutes that it describes.” *Baker v.*
15 *McCullan*, 443 U.S. 137, 144 n. 3, 99 S. Ct. 2689 (1979). “The first step in any such claim is to
16 identify the specific constitutional right allegedly infringed.” *Albright v. Oliver*, 510 U.S. 266, 271,
17 114 S. Ct. 807 (1994); *Graham v. Connor*, 490 U.S. 386, 394, 109 S. Ct. 1865 (1989). A § 1983
18 claim requires two essential elements: (1) the conduct that harms the plaintiff must be committed
19 under color of state law (*i.e.*, state action), and (2) the conduct must deprive the plaintiff of a
20 constitutional right. *Ketchum v. Alameda Cty.*, 811 F.2d 1243, 1245 (9th Cir. 1987) (*citing Haygood*
21 *v. Younger*, 769 F.2d 1350, 1353 (9th Cir.1985), *cert. denied*, 478 U.S. 1020, 106 S. Ct. 3333
22 (1986)).
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26 Further, “[t]he United States Supreme Court has held that neither states nor their officials
27 acting in their official capacities are persons under 42 U.S.C. § 1983 and therefore neither may be
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1 sued in state courts under the federal civil rights statutes.” *N. Nevada Ass'n of Injured Workers v.*
2 *Nevada State Indus. Ins. Sys.*, 107 Nev. 108, 114, 807 P.2d 728, 732 (1991) (citing *Will v. Michigan*
3 *Department of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2311–12 (1989)); *See also State v.*
4 *Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 118 Nev. 140, 153, 42 P.3d 233, 241–42 (2002).
5 However, injunctive relief against state officials acting within their official capacities is available
6 under 42 U.S.C. § 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 89–90, 109 S. Ct.
7 2304, 2322 (1989). Here, Chuck Allen was sued in his “official capacity” rather than his “individual
8 capacity” for both monetary and injunctive relief. Based on the foregoing, Plaintiff is not permitted
9 to seek *monetary compensation* from Chuck Allen in his official capacity. However, the Complaint
10 suggests that Plaintiff is suing Chuck Allen for prospective injunctive relief. Therefore, this claim
11 against Chuck Allen is not dismissed to the extent that injunctive relief is sought. *See Wilkinson v.*
12 *Dotson*, 544 U.S. 74, 78, 125 S. Ct. 1242 (2005).

15 Furthermore, it has been held that Congress *did* intend municipalities and other local
16 government units to be included among those persons to whom § 1983 applies. *Nunez v. City of N.*
17 *Las Vegas*, 116 Nev. 535, 540, 1 P.3d 959, 962 (2000) (citing *Monell v. Dep't of Soc. Servs. of City*
18 *of N.Y.*, 436 U.S. 658, 690, 98 S. Ct. 2018, 2035 (1978)). Therefore, local governing bodies can be
19 sued under § 1983 for monetary, declaratory, or injunctive relief where the action that is alleged to
20 be unconstitutional implements a policy officially adopted by that body’s officers. *Id.* at 690, 98 S.
21 Ct. at 2035-36. However, a municipality cannot be held liable solely because it employs a tortfeasor,
22 therefore a municipality cannot be held liable under § 1983 on a respondeat superior theory. *Id.* at
23 691, 98 S. Ct. at 2036. Instead, the plaintiff must identify a municipal “policy” or “custom” that
24 caused the injury. *See Pembaur v. Cincinnati*, 475 U.S. 469, 480–481, 106 S. Ct. 1292, 1298–1299
25 (1986). A “policy” giving rise to liability cannot be established merely by identifying a
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1 policymaker's conduct that is properly attributable to the municipality. The plaintiff must also
2 demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind
3 the injury alleged. *See Monell*, 436 U.S. at 694, 98 S. Ct. at 2027. That is, a plaintiff must show that
4 the municipal action was taken with the requisite degree of culpability and must demonstrate a
5 direct causal link between the municipal action and the deprivation of federal rights. *Bd. of Cty.*
6 *Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 397, 117 S. Ct. 1382, 1385 (1997). As to
7 Plaintiff's Fifth Cause of Action, Plaintiff states that he was "required to surrender \$1,430.00 upon
8 detention but upon release was deprived of the full value of his property due to Defendant's Money
9 Inventory at Booking Policy." *Compl. 6:26-28*. Plaintiff clearly pleads a policy attributable to the
10 Defendant and is thus not barred. Therefore, Plaintiff's Fifth Cause of Action is not dismissed,
11 however, Chuck Allen may only be liable for injunctive relief.
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14 Accordingly, and good cause appearing,

15 IT IS HEREBY ORDERED that the Motion to Dismiss is GRANTED as to Plaintiff's First,
16 Second, and Fourth Causes of Action.
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18 IT IS HEREBY ORDERED that the Motion to Dismiss is DENIED as to Plaintiff's Third
19 Cause of Action.

20 IT IS HEREBY ORDERED that the Motion to Dismiss is DENIED as to Plaintiff's Fifth
21 Cause of Action, however, Chuck Allen may only be liable for injunctive relief.
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23 Dated this 5th day of April, 2017.

24 
25 JEROME POLAHA
26 DISTRICT JUDGE
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28

CERTIFICATE OF MAILING

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 5 day of April, 2017 I did the following:

☒ Electronically filed with the Clerk of the Court, using the eFlex system which constitutes effective service for all eFiled documents pursuant to the eFile User

Agreement:

MICHAEL W. LARGE, ESQ.

MARK R. THIERMAN, ESQ.

☐ Transmitted document to the Second Judicial District Court mailing system in a sealed envelope for postage and mailing by Washoe County using the United States Postal Service in Reno, Nevada:

